

The record in this case consists of the documents on file with the Division of Workers Compensation including the transcript of the Preliminary Hearing held on July 7,

1994, before Administrative Law Judge Shannon S. Krysl and the exhibits attached thereto.

ISSUES

This is an application for review filed by both the respondent and the claimant from a preliminary hearing order awarding temporary total benefits, payment of medical expenses, authorizing a treating physician and denying compensation for orthopedic injuries. The issues presented for review are :

(1) Whether the claimant suffered a personal injury by accident arising out of and in the course of his employment with respondent.

(2) Whether notice was timely given.

(3) Whether the proper weekly temporary total disability compensation rate was applied in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board has jurisdiction to review this Preliminary Hearing Order as the first two foregoing issues raised by the parties are considered jurisdictional and subject to the review of the Appeals Board. See K.S.A. 44-534a(a)(2).

The claimant alleges that he sustained injuries to his head, back, left ankle and shoulder when he fell while working for the respondent on April 22, 1994. On the night in question, the claimant was employed by the respondent as a bartender/waiter. The claimant testifies that he was walking in a hallway between the consulate and salon rooms when he tripped on a mat, fell and hit his head on a portable bar stored in the hallway. He was dazed but continued to work for about one hour.

The claimant received treatment the next day at Riverside Hospital in Wichita, Kansas. He was finally referred to Wesley Hospital in Wichita, Kansas on April 26, 1994. On April 27, 1994, Leonard A. Klufta, M.D. performed surgery to relieve the effects of a bilateral chronic subdural hematoma.

The claimant suffered a loss of memory and did not remember being treated at Riverside Hospital. He did not regain any of his memory loss until after he was recovering from the operation at Wesley Hospital. When he was released from the hospital he then went to the respondent and reported his accident and filled out an accident report on May 4, 1994. The claimant testifies that the reason he did not report the accident prior to this date was because he had lost his memory due to the subdural hematoma.

A co-employee, Mr. Steve Moore, testified that on the night in question he witnessed the claimant's accident in the hallway. He saw the claimant come down the hallway, disappear, heard a bump and the claimant then got up holding his head.

In a letter to the claimant dated June 23, 1994, Dr. Klafta attributed the hematoma to claimant's fall at work in April of 1994 and not a car accident in January of 1994 in which claimant was involved. Dr. Klafta reports that the blood clots were only a few weeks old and could not have been caused by the January 1994 automobile accident.

The respondent argues that the claimant's condition was caused by the January 1994 automobile accident or in the alternative some other source as the claimant did not suffer an accident while employed by the respondent on April 22, 1994. It is the respondent's further position that since the claimant did not give notice within ten days of this accident as required by K.S.A. 44-520 that his claim is barred for lack of notice.

The claimant argues that his testimony indicating that he also was being treated by Dr. Toohey for symptoms involving his back, left ankle and left shoulder establishes that the claimant suffered orthopedic injuries as well as injury to his head. Also, claimant contends that the Administrative Law Judge erred in the determination that the temporary total compensation weekly rate was \$250.25 instead of the maximum compensation rate.

Based on the evidentiary record presented for purposes of this preliminary hearing, the Appeals Board finds that the claimant has proven by a preponderance of the credible evidence that he suffered a personal injury by accident arising out of and in the course of his employment with the respondent on April 22, 1994. Further, the Appeals Board finds that the claimant did not give respondent notice of the accident within ten days as required by K.S.A. 44-520. However, the Appeals Board also finds that the claimant's injury caused him to have a loss of memory. There was, therefore, just cause for the failure to give notice within ten (10) days such that the seventy five (75) day limit from the date of accident also permitted by K.S.A. 44-520 applies.

Concerning the denial of treatment of the alleged orthopedic injuries of the claimant, the Appeals Board finds that the claimant has not sustained his burden that such orthopedic injuries arose out of and in the course of his employment with the respondent. In regard to the issue of the correct temporary total disability compensation rate, the Appeals Board finds that pursuant to K.S.A. 44-534a(a)(2), the Administrative Law Judge has the authority to make an award of temporary total disability compensation which includes finding the weekly compensation rate and accordingly such statute does not give the Appeals Board jurisdiction to review this issue.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Shannon S. Krysl dated July 19, 1994 is affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc:

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Shannon S. Krysl, Administrative Law Judge